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Reflections on Fidelity

Cover Page Footnote

The editors of the Fordham Law Review invited me to respond to the various essays in this issue that discuss my recent book, *Freedom's Law* or the Levine Lecture that began the Symposium on Fidelity in Constitutional Theory. I do not attempt to comment on those essays that mention my work only briefly or in passing and I do not discuss those essays with which I mainly agree at as much length as the others.

REFLECTIONS ON FIDELITY*

Ronald Dworkin

I. REPLY TO JAMES E. FLEMING

I am very grateful to Professor Fleming both for his support and his very constructive criticism.¹ All of his suggestions merit very serious consideration, and I am drawn to accepting several of them. I would, moreover, second his advice that those considering the general strategy of constitutional adjudication I defend should not mistake my own failures and shortcomings in applying that strategy for defects in the strategy itself. I am particularly encouraged by Fleming's suggestion that various scholars who take themselves to be in radical disagreement with me might be disagreeing at branches further up the tree of argument that I described in *Law's Empire*² than the fundamentalist character of their rhetoric suggests.³ It would be good news if more came to share his opinion, not only because it would lower the temperature of the debate between constitutional "isms," but because it might help change that debate into something more cooperative and constructive, perhaps even including a sense of division of labor that allows the historians, architects, and philosophers of other disciplines to work together without any of those crafts demanding a titular ascendancy.

I should like, however, to reply to two of Fleming's comments in more detail. First, he is worried that readers might be irritated by my lapses into what seems to him essentialist or even Platonist speech,⁴ and he says he prefers my more "characteristic" kind of question: "What conception of democracy best fits and justifies our constitutional text and practice?"⁵—to the more inflated: "[W]hat democracy . . . really is?"⁶ The difficulty is that the first of these questions is an interpretive one, and therefore has a justificatory dimension: we must have some way of deciding which conception of democracy, could we read our practices as supporting it, would show those practices in a better light, and we must therefore take up a more abstract question of political morality. We must ask: Which understanding of "what

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1. See James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 Fordham L. Rev. 1335 (1997).

2. Ronald Dworkin, *Law's Empire* (1986) [hereinafter Dworkin, *Law's Empire*].

3. See Fleming, *supra* note 1, at 1353-55.

4. See *id.* at 1340.

5. *Id.*

6. *Id.*

democracy is" shows that form of government as best advancing or protecting more fundamental values? I take that to be an interpretive question too, though not a question of constitutional or legal interpretation, and I try to describe its interpretive character in the introduction to my next book, which is on general political philosophy. In any case, what I mean by "democracy as it really is" is the same as what I mean by "the best understanding of democracy." Indeed, I don't understand what an "essentialist" or "Platonic" theory of democracy would be, if it is something other than a theory defended in the way just described.⁷ The point is an important one, for the model of interpretation that Fleming and I favor is frequently criticized by those who charge that interpretation should aim at showing its objects as they really are, not in their best light. It is important to be able to answer, to this charge, that there is no difference.

Second, he prefers to ground constitutional rights by urging them not as conditions of democracy, as I do in *Freedom's Law*,⁸ but rather as conditions of both deliberative democracy and deliberative autonomy.⁹ I cannot be sure, without further study, how different these approaches to the problem are, though I have in the past been skeptical of basing a claim for the equal status of citizens on either of those ideals. I can immediately see, however, the attraction in Fleming's structure.

II. REPLY TO CATHARINE A. MACKINNON

I cannot usefully reply to most of what Professor MacKinnon has said, and I doubt she would expect me to do so. She suggests, for example, that my use of literary analogies in describing legal reasoning reflects my attempt to "transcend" the fact that "law isn't fiction, folks," that a consequence of my method would be awarding custody of a child to a sexual abuser when that "makes a better story,"¹⁰ that I am "indifferent" to the actual consequences of the principles I defend,¹¹ that I believe "that women can be bought and sold as sex called speech,"¹² that I "invoke[]" the very majoritarian premise¹³ that it was a central aim of *Freedom's Law* to discredit, that I have committed the sin of "trying to get in [her] way,"¹⁴ that I "float[]

7. For my reservations on the intelligibility of "platonic," used, as it generally is, in a denigrating sense, see Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 Phil. & Pub. Aff., 87 (1996) [hereinafter Dworkin, *Objectivity and Truth*].

8. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) [hereinafter Dworkin, *Freedom's Law*].

9. Fleming, *supra* note 1, at 1342.

10. Catharine A. MacKinnon, "Freedom from Unreal Loyalties": On Fidelity in Constitutional Interpretation, 65 Fordham L. Rev. 1773, 1777-78 (1997).

11. *Id.* at 1780 & n.24.

12. *Id.* at 1778.

13. *Id.* at 1774.

14. *Id.* at 1775.

above social life . . . accompanied by Herbert Wechsler,"¹⁵ whose views could hardly be more different from mine,¹⁶ and that, notwithstanding *Law's Empire* and *Freedom's Law*, I really think that law is "a closed system, a set of abstract postulates and empty axioms from which determinate conclusions are deduced,"¹⁷ so that we can only "validate" constitutional interpretation "by standards that are wholly internal to the document itself."¹⁸

I should comment, however, on her remarks about constitutional interpretation. She uses "morality" to mean only judgments about what is overall "good" or "bad," so that, in her vocabulary, defending a particular conception of equality, or interpreting the Constitution to contain one, is not an exercise in moral theory at all.¹⁹ That eccentric usage misleads her into thinking that she is offering a rival methodology to the moral reading, though she plainly embraces and relies on that reading in her interpretation of the Equal Protection Clause. It is therefore mysterious (in spite of all she says about the "elitist" and "exclusionary" and "top-down" character of my "method and content"²⁰) in what way she thinks her strategies of interpretation actually differ from mine. We disagree, so far as I know, about only one matter of substance—whether the ideal of equality she concedes we share is furthered or compromised by the kind of censorship she endorses—and she can hardly think that it is a straightforward matter of empirical fact which of us is wrong. I have offered arguments in support of my view, and it would have been helpful had she taken this opportunity to explain the mistakes in my arguments or, for that matter, in my egalitarian arguments about affirmative action, the distribution of health care, electoral reform, welfare provision, gender, sexual orientation, or any of the other political issues I have recently written about—so that I could better see how my bad intellectual habits have led me astray. It does not help me to learn that she thinks she has talked to more people than I have. Nothing would help except some actual arguments of her own.

I should also reply to the question addressed to "the moral reader" at the end of her remarks. She asks: "Who do [I] represent?"²¹ No one. Of course I agree that political and legal theorists have a public responsibility—political philosophy, as I have said, is part of politics. Academic philosophers and lawyers should never cease asking themselves what they can possibly do to make the world even very slightly less unjust and cruel. But it is crucial that we not take ourselves to

15. *Id.*

16. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

17. MacKinnon, *supra* note 10, at 1777.

18. *Id.*

19. *Id.* at 1775-77.

20. *Id.* at 1773, 1775.

21. *Id.* at 1780.

represent any constituency, for the sufficient reason, among many others, that no one has appointed us to represent them, and that we are not, in spite of what she says, accountable in any significant sense to anyone. MacKinnon knows that a great many feminists who are as passionate as she is in condemning the economic, political and social inequalities of our society think that her various campaigns have done more harm than good to their cause. She has no doubt taken note of their views, but she does not regard herself as accountable to them, no matter how numerous they might be. She properly thinks that her responsibility is to say and do what she thinks right. But she should not claim to wear any group's colors in her battles.

III. REPLY TO MICHAEL W. MCCONNELL

Professor McConnell has much expanded his colloquium comments in this published version, and I am grateful.²² His article helpfully collects most of the standard objections to my arguments from the "originalist" camp. Here we find, in one place, the now familiar suggestions that the version of originalism I refute is a straw man,²³ that I am guilty of the logical "fallacy of black-and-white reasoning" about the Constitution,²⁴ ignoring the truth in between, and that I would subvert democracy by not letting the people decide fundamental moral issues for themselves.²⁵ The article has more positive merits. I am in McConnell's debt, for example, for pointing out my shoddy statement of alternative understandings of "gay" in *Paradise Lost*,²⁶ and I have corrected my text accordingly.

The article's main value, however, lies in its partial responsiveness to the issues in theory of meaning that I have been struggling to show are pertinent to the long debate about constitutional adjudication. Academic constitutional lawyers have long understood the importance of sophistication in other disciplines including history and economics: they are rightly impatient, for example, with declarations about the Framers' sources that show no evidence of any contact with recent or good intellectual history. But though most of them make central use of the concepts of speech, meaning, and intention, all of which have been the object of the most intense philosophical scrutiny in the last century, many are content with an understanding of those subjects that is far less sophisticated than what they demand in those other disciplines. That failure has, among other unfortunate consequences, reinforced the pigeon-holing instincts from which we aca-

22. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *Fordham L. Rev.* 1269 (1997).

23. *Id.* at 1284.

24. *Id.* at 1282.

25. *Id.* at 1290-92.

26. *Id.* at 1279-80.

demic lawyers suffer: we inveterately assign constitutional theories to categories reflecting too simplistic an account of the actual argumentative possibilities. It has also, sadly, prevented us from making much progress toward a resolution of the old differences, or even from making the differences more interesting.

McConnell is not free from the pigeon-holing propensity, and it damages his article. Though he is certain that his disagreement with me is a profound one, he has great difficulty in identifying it. Indeed, as we shall see, he very often describes me as rejecting opinions I have enthusiastically embraced, and as accepting other opinions I have emphatically rejected. At one point, conscious of this difficulty, he ascribes it to what he calls my great ambiguity, and to the fact that there are "two" Dworkins.²⁷ I would urge him at least to consider, however, a different though not necessarily more charitable explanation, which is that I have failed to persuade him that the familiar pigeon-holes are inadequate.

Some examples of McConnell's failure to take account of my theoretical proposals are striking. I have several times, for example, used Justice Scalia's arguments about capital punishment and the Eighth Amendment to illustrate the distinction between semantic and expectation intentions,²⁸ and I did so in *Freedom's Law* and in the *Levine Lecture*,²⁹ on both of which McConnell comments. If the distinction is sound, I said, then Scalia's well-known arguments fail.³⁰ But McConnell simply repeats those argument, as if they were decisive against me, with no acknowledgment of my own analysis. On other occasions the failure leads directly to the evident misstatements I mentioned. He begins, for instance, by reconstructing my arguments in the following way. I agree, he says, with the "mainstream" view that "even after consulting the semantic intention of the Framers, as revealed in history, there still will remain multiple plausible interpretations."³¹ I disagree with the "mainstream," he says, only because I think that, in that case, "thoughtful judges must then decide on their own which conception does most credit to the nation,"³² whereas in the mainstream tradition, a judge should at that point decide that the statute in question is "constitutional."³³ This is wrong in two ways. First, it is not my view that "after consulting the semantic intention of the Framers" different accounts will remain equally plausible. On the contrary, though different interpreters will undoubtedly think different inter-

27. *Id.* at 1270.

28. *Id.* at 1276-77.

29. See Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 Fordham L. Rev. 1249 (1997) [hereinafter Dworkin, *The Arduous Virtue of Fidelity*].

30. See McConnell, *supra* note 22, at 1276-77.

31. *Id.* at 1271-72.

32. *Id.* at 1272 (quoting Dworkin, *Freedom's Law*, *supra* note 8, at 11).

33. *Id.* at 1272-73.

pretations the most plausible, most of them are likely to think one more plausible than its rivals.³⁴ Second, my claim that "thoughtful judges must then decide on their own" is not, as McConnell says it is, premised on the idea that more than one interpretation of what they said is equally plausible.³⁵ In fact, it is premised on the contrary assumption that a particular kind of interpretation—that the Constitution states abstract moral principles—is the most plausible. My claim, that is, is not that judges should appoint themselves constitutional tie-breakers instead of leaving that office to legislatures, but that they must exercise the judgment I describe in consequence of their view of what the Constitution *requires* of them. McConnell no doubt disagrees with that claim. But he lacks the resources even to state it, unless he distinguishes, as I do, the question of what the Constitution means from the different question of what follows, about the decision of concrete cases, from its meaning what it does.

He tries and fails to state our disagreement again later.³⁶ He says that he thinks, but I deny that "[t]he job of the judge is to ensure that representative institutions conform to the commitments made by the people in the past, and embodied in text, history, tradition, and precedent."³⁷ But that is exactly what I said *is* the job of the judge—indeed my own formulations of the responsibility are rather close to that one. The real question, of course, is how that job is to be carried out, and answering that question must start in unpacking the metaphor of "embodiment." If the best answer to the interpretive question is that the "embodied" commitments are abstract ones, then judges can't "ensure" that representative institutions conform to them without the substantive moral reflection that McConnell criticizes me for expecting.³⁸ Still later, McConnell says that according to my view, "the words of the Constitution should be read as abstractions having meaning independent of any meaning that the Framers and Ratifiers, or the people, may have intended to communicate."³⁹ Once again I said the opposite: I said that it is crucial at least to begin with what the Fram-

34. See my comments on Professor Tribe in Dworkin, *The Arduous Virtue of Fidelity*, *supra* note 29, at 1256-62; see also Dworkin, *Objectivity and Truth*, *supra* note 7.

35. See McConnell, *supra* note 22, at 1272.

36. *Id.* at 1273.

37. *Id.*

38. McConnell says: "Fit is everything." *Id.* at 1273 (quoting Bruce Ackerman, Remarks at the New York University School of Law Colloquium in Constitutional Theory, Nov. 16, 1993 (colloquy between Ackerman and Ronald Dworkin)). But fit (at least if he is using the term as I have) just *can't* mean everything in *any* kind of interpretation, including our understanding one another over a dinner table. It can't mean everything for the familiar logical reason that a set of data underdetermines its own explanation. We can understand "embodiment" only if we have at hand a more adequate account of interpretation, and though McConnell is of course free to reject the one I described in Chapter 9 of *Law's Empire*, he should describe an alternative that yields the enormous discretion that he says legislatures have.

39. McConnell, *supra* note 22, at 1276.

ers and Ratifiers "intended to communicate." I only insisted on a distinction between what they intended to communicate and what they thought would or should be the legal upshot of their communicating in that way. Still later he accuses me of fallacy because I fail to recognize the difference between reading the Constitution "in the light of the moral and political principles [the Framers] intended to express," which he favors, and reading it "in light of what we now think would be the best way to understand the abstract language."⁴⁰ If "express" means "enact," and if "we now think would be the best way to understand the abstract language" means "we now think they meant to say in using the abstract language they did," then there is no pertinent difference between the two. If the latter language means, however, something like "we would have preferred the Framers to state," then there is indeed a difference between the two. I recognized that difference, rejected the second proposition so understood, and endorsed the first, as McConnell does. Still later he says, summing up the view he defends against me, that: "The people's representatives have a right to govern, so long as they do not transgress limits on their authority that are fairly traceable to the constitutional precommitments of the people themselves, as reflected directly through text and history, or indirectly through longstanding practice and precedent."⁴¹ But that is my view too: We disagree, not because I reject that unexceptionable statement, but because we have different ideas about what is "fairly traceable" to these interpretive sources.

In fact every one of McConnell's attempts to describe our differences, at this level of generality, fails. But he does, as I said, attend to the theoretical structure I try to defend on some occasions, and on those occasions, he is much more successful in identifying differences. He argues, for example, that the distinction I make so much of, between semantic and expectation intention, is in fact ill-formed. "In the context of directive or prohibitory language," he says, "what the authors intend to 'say' is precisely what they intend to require, authorize, or prohibit; thus, what they intend to 'say' is what they intend to have happen 'in consequence of their having said what they did.'"⁴² This statement is unexceptionable until the "thus," but the "thus" is very bad news, and what follows is a non-sequitur. In the story I told in the *Levine Lecture*, for example, the boss intended his son to be hired "in consequence" of his having directed the manager to hire the best candidate, but he did not intend to say that the manager should hire the boss's son.⁴³ On the contrary, he particularly intended *not* to say that, and our understanding of the whole phenomenon of speech would be crippled if we did not appreciate that distinction.

40. *Id.* at 1284.

41. *Id.* at 1291.

42. *Id.* at 1280.

43. Dworkin, *The Arduous Virtue*, *supra* note 29, at 1255-56.

On some occasions, of course, it is difficult to make this distinction in practice. Our judgments about a speaker's beliefs and hopes, including his expectation intentions, are always pertinent to our judgment of his semantic intentions, that is, about how best to translate the sounds he has made—they are part of the great swirl of information out of which any translation emerges—and it may be difficult to decide how far the semantic intention incorporates those expectations. If the facts were different from those I described in telling my story, for example, we might find it difficult to choose between two interpretive descriptions: that the boss did not intend to order the manager to hire his son, though he hoped and expected that she would hire him, or, on the contrary, that the boss did intend to order her to hire his son. I took care to say that the boss did not wink or nudge the manager when he said to hire the best candidate; if he had winked or nudged, the better interpretation might well be that he did intend his words to be taken in the latter way—as an order to hire his son.⁴⁴ But though on some occasions the distinction might be difficult to draw, and reasonable interpreters might draw it differently, it is nevertheless always an absolutely indispensable distinction, without which interpretation of particular speech events is impossible, as my discussion of Tribe's criticism in the *Levine Lecture* I think shows.⁴⁵

McConnell's own example, about drafting and interpreting the Ex Post Facto Clause,⁴⁶ doesn't seem particularly difficult, however. We must choose between two general accounts. On the first, the drafters meant, even after Dickinson's report, to lay down a broad clause to the effect that all *ex post facto* laws, including civil ones, would be unconstitutional, even though, after the report, they feared that in spite of their intention only criminal legislation would in fact be affected.⁴⁷ On the second, they understood, after his report, that the language they thought general had acquired a more restrictive term-of-art sense, and they therefore, when they nevertheless used the language, intended to say only that *ex post facto* criminal statutes were forbidden.⁴⁸ These two interpretive reconstructions are plainly different, and though I have not studied the matter, the second seems, from what McConnell says, much the more plausible, which is what the courts have decided.⁴⁹ The example illustrates, therefore, the pertinence of history to the construction of semantic as well as expectation intention, and also the importance and robustness of the distinction McConnell challenges.

44. *Id.* at 1255.

45. *Id.* at 1256-62.

46. See McConnell, *supra* note 22, at 1280.

47. *Id.* at 1280 n.54.

48. *Id.*

49. See *id.* at 1280.

In other, particularly helpful, passages McConnell seems to accept the distinction between semantic and expectation intention, and to take issue only with my application of it. He accuses me, for example, of supposing that in finding an interpretive translation of the Equal Protection Clause we are forced to choose between what I described as a ludicrously weak interpretation and a breathtakingly strong one; he believes that I state a false dichotomy.⁵⁰ Of course he might be right: I might have overlooked a host of "intermediate" semantic reconstructions, and that is why I have been asking for actual intermediate proposals. McConnell's own suggestions, however, have little plausibility as claims about semantic intention. He says, for example, that the clause might be understood as laying down "a rule of strict formal equality, requiring all citizens to be treated without regard to race or other morally irrelevant distinctions."⁵¹ That is more, rather than less, "breathtaking" than my own suggestion, because it makes constitutional validity depend on the notoriously abstract and controversial issue of moral relevance, and would, according to the most plausible views on that issue, be even more permissive than the "ludicrously weak" translation. Is race really morally *irrelevant* in designing an elementary school program? Or is whatever relevance it might have simply outweighed by the requirements of equality? Is gender or sexual preference relevant or irrelevant in considering which sexual acts to prohibit or what standards to enforce in hiring for different positions? Is race morally irrelevant when university admissions officers aim at diversity, or, differently, at social justice?

McConnell also proposes that the clause might be read as limited to "civil" as distinct from "social or political" rights.⁵² This "civil rights" thesis might be a plausible account of the Framers' own principles, and therefore of their expectation intentions.⁵³ They believed (as we do) that some distinctions among groups of citizens are compatible with equal citizenship and others not, and historians might provide good reason to suppose that most of them thought (as perhaps some of us do) that distinctions in social and political rights are compatible, and distinctions in civil rights are not. They therefore expected and intended that the equal protection clause would outlaw only the latter distinctions. But it would not follow, even if that were true, that the Framers intended to say, in using the language of equal protection, that only inequalities in civil rights were unconstitutional. We can imagine evidence that would incline us to the second view: we might learn, for example, that the words "equal protection" had acquired a special term-of-art sense such that anyone who meant to be understood in the second way would naturally use those words. But in the

50. *Id.* at 1281-82.

51. *Id.* at 1282.

52. *Id.*

53. *Id.*

absence of such evidence the fact that there is no hint of such a distinction in the clause itself means that this supposed translation is a very implausible one.

The difference between semantic and expectation intention is also crucial in assessing McConnell's charge that the "originalist" I refute is a person of straw.⁵⁴ I say that originalists look to the Framers' expectation intentions rather than semantic intentions. McConnell confirms that diagnosis by insisting that they look to the Framers' general opinions not to the very concrete ones he claims that I make decisive. No one, he says—not even Robert Bork—thinks that the Constitution means only "that judges may apply a constitutional provision only to circumstances specifically contemplated by the Framers";⁵⁵ originalists only insist, according to McConnell, that judges must enforce the Framers' "principles" rather than their own.

I do not recall saying that originalists insist on limiting the Constitution's protection to what the Framers actually had present in mind, or to their concrete expectations about very particular cases *as distinct from* their more general moral opinions. In fact I have often called attention to originalists' claims—particularly Bork's—that they are concerned not with the Framers' concrete judgments but with their general principles.⁵⁶ I have indeed argued, however, that they are fooling themselves in that claim, because so long as they are concerned with the Framers' *opinions*, rather than with what they *said*, they have no non-arbitrary way of picking out any particular level of generality at which these principles are to be formulated and enforced, except the most concrete possible level, so that when they disavow that crippling level, they are left with no constraint at all. They are free to choose—indeed they have no way to avoid choosing—whatever level of generality in stating the Framers' principles will produce the decision they independently think the right one.⁵⁷ For there is no such thing as the level of generality at which someone's moral opinions are most accurately reported, though there *is* such a thing as the most accurate report of the level of generality at which a person spoke on some particular occasion.

McConnell's discussion of Aristotle brings all this out nicely.⁵⁸ We can ask two very different questions about Aristotle. The first is the question that interests McConnell: what were Aristotle's principles of (say) distributive justice? The second is a question of translation: what did Aristotle say in the passage that begins (say) at 1131a-24 of Book V of the *Nicomachean Ethics*? Suppose we ask McConnell's

54. *Id.* at 1284.

55. *Id.* (quoting Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 San Diego L. Rev. 823, 826 (1986)).

56. See, e.g., Dworkin, *Freedom's Law*, *supra* note 8, at 298-99.

57. *Id.* at ch. 14.

58. See McConnell, *supra* note 22, at 1285-86.

question in this way: "Tell me what Aristotle's general principles of distributive justice were, as distinct from his concrete opinions about particular questions that might arise, and, of course, as distinct from your own principles, which may be very different." Someone might offer any of the following different answers (I don't mean to endorse any of them). "Aristotle thought that distributive justice was a virtue: that is, that everyone should be just." "He thought that justice is a matter of proportion: a good is justly distributed between two people, according to him, if the difference in the amount each has corresponds to the difference in their merit." "He agreed with what he called the 'aristocratic' view that merit means excellence, and he rejected the democratic view that merit means the status of a freeman and the oligarchic view that it means money or noble birth." "He thought intellectual excellence more important than any other kind, and that those with intellectual merit should therefore have more honor." "He thought philosophy the highest form of intellectual exercise and that justice therefore required that philosophers should have the most honor of all."

These answers are progressively more concrete, at least in one obvious dimension: each answer, we might say, is nested in those that came before it. They are also progressively fuller answers: the most concrete answer would also be the most complete. But none of them is, in virtue of its level of generality, a more *accurate* answer to the initial question than any other, and if we were for some reason forced to select, from among them, a canonical statement of Aristotle's "principles" of distributive justice to guide us in some constitutional exercise, we could only choose either the most concrete, on the ground that it is the most complete, or among the others wholly arbitrarily. Shall we say that his principle was that justice is a virtue, and that he might well have made a mistake in the application of his principle in thinking that that virtue lay in distributing proportionally to merit? If so, we could claim that following Rawls's theory of justice was applying Aristotelian principles, though not, of course, in exactly the way Aristotle would apply them. Or shall we say that his principles included the principle that justice is a matter of proportion to merit, but that he might have made a mistake in applying that principle in agreeing with the aristocratic view of merit rather than one of the others? In that case, we could claim that a correct application of Aristotelian principles meant an equal distribution to all citizens, though he himself would not have thought that. Or shall we say that his principles included the aristocratic claim, though he might have made a mistake in applying that latter principle in thinking intellectual qualities the highest excellence? And so on. If anyone announced he was interpreting a constitution according to Aristotle's real principles, rather than according to the philosopher's more concrete opinions, he would have announced nothing at all.

It would be a very different matter, however, if someone declared he was applying what Aristotle *said* in the passage I mentioned. I know of no reason to quarrel with the standard translation according to which Aristotle said, in that passage, that justice is a matter of proportion to merit, leaving open for future decision what merit consists in. So someone claiming to follow that statement would have to decide, for himself, what merit is. Of course there may be a reason to quarrel with that translation—I am not a scholar of the text—in which case the matter would not be as uncontroversial as I think it is. But there is no reason to doubt what every translator assumes, which is that some translation, picking out a particular level in the nesting I just described, is the most plausible one. So in describing the question of “what Aristotle’s principles were” as the pertinent question, McConnell has reinforced my sense that originalists make the Framers’ political principles or expectation intention decisive. But he has not relieved my worry that, for that very reason, they have no way of stopping their account from collapsing into the position they think I invented for them.

I have nothing helpful to say in response to McConnell’s final comments about democracy, because he has here made no attempt to reply to my actual arguments. I don’t, as he says I do, attribute deference to popular decision-making to “the ‘grip’ of the ‘majoritarian premise.’”⁵⁹ On the page he cites, I attribute to the grip of that theory only the popularity of one particular argument for such deference, and elsewhere in the book I emphasize that there are many different and better arguments for it.⁶⁰ He says that the ideal of democracy, for me, would be government by an enlightened “trustee” acting out of genuine equal concern for all citizens but allowing them no participation in government.⁶¹ I explicitly said the opposite at several points in the text he is discussing.⁶² He says, “[Dworkin’s] vision leaves something out: self-government, or political liberty.”⁶³ But I said that self-government, or political liberty, was at the heart of democracy, and my arguments all turn on an attempt to find a decent understanding of what self-government is.⁶⁴ He says that I am the captive of the “judicial premise.”⁶⁵ But I was careful not to exclude the claim that the best form of democracy would be one without judicial review as we know it, in which all constitutional decisions were made by majoritarian institutions.⁶⁶ As I said earlier, I must at least share in the blame for these serious misunderstandings of my views.

59. See McConnell, *supra* note 22, at 1290.

60. See Dworkin, *Freedom’s Law*, *supra* note 8, at 33.

61. See McConnell, *supra* note 22, at 1290-91.

62. See Dworkin, *Freedom’s Law*, *supra* note 8, at 24-25, 32.

63. See McConnell, *supra* note 22, at 1290.

64. See Dworkin, *Freedom’s Law*, *supra* note 8, at 21-26.

65. See McConnell, *supra* note 22, at 1291.

66. See Dworkin, *Freedom’s Law*, *supra* note 8, at 33.

But it is depressing how little we have all succeeded in rescuing the constitutional discussion from the same old ruts.⁶⁷

IV. REPLY TO JED RUBENFELD

Professor Rubenfeld offers a logical argument meant to show that it is not enough to support a recommended style of constitutional adjudication only to appeal to some theory of interpretation.⁶⁸ In the end, he says, we must ground our argument in a political theory of legitimacy.⁶⁹ I agree, but I am unclear why I am listed among those who needs that lesson.⁷⁰ I have argued the same claim for many years, and my own suggestions about adjudication are explicitly based on the political theory of legitimacy I tried to defend in Chapter 6 of *Law's Empire*, as well as elsewhere. Rubenfeld replies that in *Law's Empire*, as a matter of exposition, I began with interpretation. But that is not the same thing as stopping there.

It is independently important, however, to see why Rubenfeld's logical argument is fallacious. Any general theory of interpretation, he says, is radically incomplete because it is itself an interpretation, and therefore it presupposes a theory of what makes an interpretation of anything a good one.⁷¹ But it cannot presuppose itself in that capacity, because that would beg the question. So it must presuppose a different and therefore rival theory of interpretation as more securely grounded than itself, which is a concession of its own infirmity. "This

67. I have left some miscellaneous matters for this footnote. I do not comment on McConnell's very controversial account of the question of school segregation directly after the Fourteenth Amendment was adopted. See, e.g., Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995). Of course, if this example of the outrageous results that a strict expectation-intention reading would produce is based on bad history, as McConnell claims, other examples could easily be produced, and, in any case, originalists' preoccupation with the segregation issue shows how tied to expectation-intention they actually are. See Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History*, 19 Harv. J.L. & Pub. Pol'y 351, 360 (1996). McConnell is right that I do praise the Supreme Court's decision about homosexual rights in *Romer v. Evans*, 116 S. Ct. 1620 (1996). But he is not right that I approve of the Court's failure to discuss the impact of its decision on *Bowers v. Hardwick*, 478 U.S. 186 (1986). I suggested the contrary in the *Levine Lecture* printed earlier in this issue, and repeated my criticism in my Coif Lecture last November, *In Praise of Theory*, which will shortly appear in the *Arizona State University Law Journal*. My response to his comments about assisted suicide would follow those of the so-called "Philosophers' Brief," filed on behalf of Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, Judith Jarvis Thomson, and myself in *Washington v. Glucksberg* and *Vacco v. Quill*, both now pending in the Supreme Court. See Ronald Dworkin et al., *Assisted Suicide: The Philosophers' Brief*, N.Y. Rev. Books, Mar. 27, 1997, at 41 [hereinafter Brief]. I would deny the fact, and even the possibility, of "two Dworkins" one championing fit and the other right answers. See McConnell, *supra* note 22, at 1270.

68. See Jed Rubenfeld, *On Fidelity in Constitutional Law*, 65 Fordham L. Rev. 1469, 1474-77 (1997).

69. *Id.* at 1477.

70. *Id.* at 1471-72.

71. *Id.* at 1473.

other mode of interpretation," he says, "that should have been ruled out but instead turns out to have been presupposed, makes it impossible to claim that the interpretive theory dictates a specific methodology for constitutional law."⁷²

We can quickly see that something is wrong with this argument. Since a theory can't justify itself by pressing the snake of a rival theory to its own bosom, but can only destroy itself in that way, the argument, if valid, would prove not that we have too many eligible theories of interpretation, but none at all. We might start, in seeing what has gone wrong, with an essential distinction between two questions. When is it sensible to ask for an external justification for a theoretical claim—a justification, that is, that does not presuppose the truth of part of what is being justified? When this is sensible, with respect to some theoretical claim, can an external justification actually be supplied? The first is a complex and disputed question of epistemology, but it seems plausible to say, as many philosophers do, that an entire domain of supposed knowledge or belief, like science as a whole or a comprehensive moral system, cannot have an external justification and does not need one.⁷³ (As we shall see, Rubinfeld apparently agrees, at least in the case of science.) But someone who defends, not science as a whole, but, for example, a particular proposition of biology can sensibly be asked to provide evidence or argument for it that does not simply assume its truth, and we can indeed reasonably expect someone who offers advice about the right way to conduct some special level or kind of interpretation to argue for that advice in a way that does not assume its cogency.

Rubinfeld apparently thinks that writers who offer accounts of special types of interpretation must fail to meet that reasonable requirement. He says, for example, that Professor Fish is a victim of the self-referential fallacy because his theory of literary interpretation is itself an interpretation.⁷⁴ But an interpretation of literary or conversational or legal interpretation is no more an exercise in literary or conversational or legal interpretation than a philosophical analysis of promising is itself a promise. Professor Davidson is not translating what someone else has said when he offers an account of how we translate what someone else has said. Nor is someone who proposes a theory of textual interpretation interpreting any text.

Rubinfeld quotes my own comment in *Law's Empire* that "if a community uses interpretive concepts at all, the concept of interpretation itself will be one of them: a theory of interpretation is an interpretation of the higher-order practice of using interpretive concepts. (So any adequate account of interpretation must hold of itself.)"⁷⁵

72. *Id.*

73. See Dworkin, *Objectivity and Truth*, *supra* note 7.

74. See Rubinfeld, *supra* note 67, at 1473-74.

75. Dworkin, *Law's Empire*, *supra*, note 2, at 49.

This, I said, is a necessary condition of a successful account of interpreting a particular kind of concept that plays a particular role in our social and political lives. But I certainly did not count satisfying that necessary condition as a sufficient condition of success; I defended my own account of how interpretive concepts should be interpreted not by appealing to itself, but by calling attention to the structure of social practices (like the practice of arguing about what courtesy actually is or demands) in which people back social claims with arguments trying to show how a practice would go better if their claims were recognized as sound or appropriate within it.

Rubinfeld might say, however, that these latter claims about social practice are themselves constructive interpretations at a higher level, because any explanation of human behavior, whether it takes the form of a philosophical account of translation, or a semantic theory of speech acts, or an account like mine of a social practice, is in the most general sense an interpretation that seeks to make the best sense of human thoughts, acts, practices and institutions, so that the question can therefore always be asked, even at the most general level, why we should try to understand ourselves in *that* way, rather than, for example, by seeing how we can make the least or worst sense of ourselves. We have something to say in answer to that question: we can appeal to an ethical standard of inquiry that connects our investigation of anything with our ethical responsibilities. But that roughly pragmatist conception of inquiry can itself be challenged, and, of course, explanation must come to an end someplace. At that point, according to Rubinfeld's argument, we face his dilemma. Either we just assume the truth of the entire package of ideas we have been defending, including its account of interpretation as making best rather than worst sense of what is interpreted, in which case we have begged the question, or we presuppose a different, rival set of ideas, in which case we have embraced two sets of ideas, not one.⁷⁶ He answers, that is, that the demand for external justification must be met no matter how global the scope of the ideas on which that demand is pressed.⁷⁷

In the discussion that followed his paper, I pointed out that if his argument were sound, it would follow that science and mathematics and other apparently well-established domains of thought are also self-defeating. Scientists, for example, claim to have established truths through a complex methodology in which empirical assumptions about the interaction between human brains and the world figure prominently. But these empirical assumptions can themselves be challenged, and it would beg the question to claim to validate them through the very methodology they themselves are said to support. So, if Rubinfeld's thesis were sound, any scientist must be assuming

76. See Rubinfeld, *supra* note 67, at 1473.

77. *Id.* at 1477.

some other, rival, methodology that justifies the premises of the methodology he is trying to defend. He has left us with two scientific methodologies, not one, and we must turn elsewhere (to political theory?) to choose between them. (We can easily construct a parallel argument aimed at the heart of mathematics.)

Rubenfeld replies to my argument in his published text. He says that I am correct about our inability to defend science and mathematics in any but a question-begging way, and that he meant to make the same point in calling his thesis a "Gödelian" one.⁷⁸ But he adds the *ad hominem* comment that "math and science stand on a somewhat firmer footing, making somewhat firmer claims on our belief, than does *Law's Empire*."⁷⁹ My aim, of course, was not to challenge these domains as no sounder than my own theories, but on the contrary to rely on their solidity to show the fallacy in Rubenfeld's argument. The following three propositions cannot all be true: (1) A theory suffers from a fatal self-referential contradiction if it cannot defend its most basic claims without begging the question, because it must then assume the truth of a rival account of its own territory; (2) Science, mathematics and other large domains cannot defend their most basic claims without begging the question; (3) Science and mathematics stand on firm footing. Since Rubenfeld says that he accepts (2) and insists on (3), he must abandon (1). A theory may be complete and coherent even though it can appeal to no wholly external support.

But perhaps Rubenfeld's present point is that he meant (1) to hold only for theories that are controversial, as any general account of interpretation is likely to be, and not for domains of thought like mathematics and most of science which are not controversial. But the controversiality of a body of thought cannot affect the logical consequences of its failure to find external support. If that failure is fatal on logical grounds, then science and mathematics do not "stand on firm footing" after all, in spite of the widespread opinion that they do. If that failure is not fatal, so that science and mathematics can stand on a firm footing, then it is not a reason to reject a global but controversial set of ideas that it lacks external support. Any reason to reject it must lie elsewhere, presumably in the greater appeal of a rival set of ideas. That point has special importance to moral theory. A grand and comprehensive system of moral claims cannot claim any non-question-begging support from outside itself, but though we may reject such a

78. *Id.* at 1474-75 & n.11. Gödel's theorems are making a comeback in legal theory—for another example, see MacKinnon, *supra* note 10, at 1777 & n. 17. I do not know if Rubenfeld's adjective is meant to suggest any support for his views from that quarter. Neither Gödel nor any of his interpreters suggested that it follows from the fact that some propositions can be formulated within a formalized arithmetic that cannot be proved or disproved within it that arithmetic harbors or presupposes an anti-arithmetic.

79. Rubenfeld, *supra* note 67, at 1475 n.11.

system as unfounded or unconvincing, we must not insist that it has therefore already rejected itself.

V. REPLY TO FREDERICK SCHAUER

I'm very grateful to Professor Schauer for his close, careful, and on the whole sympathetic reading of my work over many years, and I find his careful analysis of the interconnections among text, semantic intention, and legal principles very instructive indeed.⁸⁰ I cannot give his critical comments, suggestions, and hypotheses anything like the attention they deserve here. I must reserve that for another occasion. I shall only try, now, to respond in a general way to some of his main themes, principally by calling attention to what I have said over the years that I believe pertinent.

I think it is important to distinguish, as I did in the *Levine Lecture* earlier in this issue, among the various factors that properly enter into an interpretive argument hoping to establish what the law now is in virtue of a canonical text like a statute or a Constitution. One such factor, on which I concentrated in that lecture, is the semantic intentions of the people whose decisions made that text part of the law, that is, what they intended to say in it. The demands of legal integrity mean, however, that a great deal more than original semantic intention is also relevant. Practice under a canonical text—roughly, how it has been understood and interpreted by courts and other officials in the past—is always pertinent: the law in virtue of a statute may be different after years of interpreting that statute than what it was directly after the statute was enacted. The gravitational force of principles underlying closely related—and even not so closely related—areas of the law is also relevant, though in a different way. It is itself an interpretive question how the relative force of these different interpretive sources changes depending on the character of the legal issue in play: it seems appealing to think, for example, that semantic intention should count differently in constitutional cases than in commercial ones.

I mean all of this simply to summarize central arguments of *Law's Empire*. In the Introduction to *Freedom's Law*, and in the *Levine Lecture*, I concentrated on semantic intention in the constitutional theater, and I tried to emphasize that the question of what we should take a body of statesmen or politicians to have said, in endorsing some particular language on some particular occasion, is not answered by hypotheses about individual mental states, but rather by an attempt to make best sense, as a political act, of their endorsement of that language. The acontextual meaning of the language they used is pertinent to that project, of course. As I pointed out in *Law's Empire*,

80. Frederick Schauer, *Constitutional Invocations*, 65 Fordham L. Rev. 1295 (1997).

supposing that statesmen meant to say something very different from what they would normally be taken to have said *pro-tanto* makes their performance a poor one. But, of course, more than the acontextual meaning is pertinent: otherwise there would be no point in the distinction between contextual and acontextual sense. So I would not go so far as Schauer at times suggests I would, even in my alleged "later" stage, in deference to the latter.

More than the acontextual meaning is plainly pertinent when the question is whether statesmen who have set out a list of conditions under which a will or an amendment to a will is valid intended thereby also to say that nothing but the absence of features on the list could damage its validity. So I continue to think that the majority reached the right decision, in *Riggs v. Palmer*,⁸¹ in holding that, according to the better interpretive reconstruction, those who created the Statute of Wills did not intend to say something that allowed a murderer to inherit from his victim. (How nice to encounter *Riggs* and other Eastcheap companions of one's youth after so many years.) It is a perfectly familiar speech practice not to include, even in quite specific instructions, all the qualifications one would accept or insist on: all the qualifications, as one might put it, that "go without saying." It is, however, quite a different matter to attribute to statesmen who declare for equal protection an intention to say something much more restricted than the acontextual meaning of the words they use, for we lack what we evidently have in *Riggs* and similar cases—a convincing explanation for the speech acts in question. We lack a convincing explanation of why it would be an act of constitutional statesmanship to use such abstract language to say something much more concrete than the language could reasonably be thought to communicate.

VI. REPLY TO ROBIN WEST

Professor West's comments about principle, integrity, treating like cases alike, and the dangers of a flattening universalism about human nature and practice are refreshing, valuable, and often moving.⁸² I agree with her that there is nothing in my account of constitutional adjudication, even under the moral reading, that insures that constitutional law will not be conspicuously unjust, and I would second her warning, toward the end of her article, that preoccupation with constitutional law might distract us from insisting that justice play its proper role in the social and personal choices that, on any reading, constitutional law leaves open to us collectively and individually.

I shall focus on West's intriguing suggestion that an undue concentration on the idea of equality, and an undue appeal to the importance

81. 22 N.E. 188 (N.Y. 1889).

82. See Robin West, *Integrity & Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 Fordham L. Rev. 1313 (1997).

of deciding like cases alike, has marred constitutional law and theory. She cites the contraception cases, particularly *Griswold v. Connecticut*,⁸³ and *Eisenstadt v. Baird*,⁸⁴ and the recent homosexuality case, *Romer v. Evans*,⁸⁵ and argues that these "liberal" decisions were and continue to be defended through falsehoods that wrongly claim uniformity where there is not only difference, but instructive difference that is submerged to our cost.⁸⁶ She may have misidentified the principles that a proper appreciation of integrity would suggest is latent in the various decisions she discusses, however. For though the idea of integrity does require that general principles be identified in past decisions and practices, it does not suppose that the identification of such principles is mechanical, or is severely constricted by past opinion or rhetoric.

Two different and rival principles might be said to lie behind the contraception and *Romer* decisions. West describes one of them—the principle that the family is a critical social institution and that personal decisions touching its character and importance should therefore be immune from state regulation.⁸⁷ She rightly argues that appealing to that principle to justify decisions about contraception and homosexuality is unrealistic and relies on bad psychology.⁸⁸ The second interpretive strategy is, however, much more persuasive. It argues that the cases rest on a liberal political principle: that government may not limit liberty in matters of choice that have momentous personal consequences when it must rely, as justification for forcing one choice on everyone, on a controversial ethical—as distinct from moral—thesis.⁸⁹ This liberal principle unites a variety of different political and social issues, not through universal assumptions about motives and meaning, but in virtue of the centrality of a particular kind of liberty—or, if you prefer, a particular vision of the appropriate bases of political community—to a variety of otherwise very different political issues. Justice Brennan's opinion for the Court in *Eisenstadt* relies on this second principle, not on the first one, as do what I believe to be the best academic defenses of these various decisions.

For the same reason I believe that the decision in *Romer* can successfully be defended while taking no position on the question how far and in what ways homosexual sex is like or different from heterosexual sex in psychological or other dimensions. It is enough to say that

83. 381 U.S. 479 (1965).

84. 405 U.S. 438 (1972).

85. 116 S. Ct. 1620 (1996).

86. West, *supra* note 81, at 1321-33.

87. *See id.* at 1323-26.

88. *Id.* at 1324-25.

89. I have described and tried to defend that principle on many occasions, including the article West cites, Ronald Dworkin, *Sex, Death and the Courts*, N.Y. Rev. Books, Aug. 8, 1996, at 44, and Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (1993).

personal decisions about the character of one's sexual experience are momentous, and that, as West agrees, any plausible justification a state might have for making one choice criminal, or for forbidding state subdivisions from protecting those who make that choice against discrimination, must be drawn from an ethical theory about what sex is "for" or when it is "against nature." We may, of course, insist on the liberal principle without paying what West calls the "opportunity cost" of submerging pertinent differences between homosexual and heterosexual experience, including the different roles of women in lesbian and marital sex.⁹⁰

It is important, however, not to make the mistake of trying to convert the liberal political principle into a psychological or epistemic one. West describes the argument for a limited right to control the manner of one's own death as relying on the assumption that a dying patient knows his or her own interests best, and she questions whether that is true in the case of someone experiencing the depression it is reasonable to expect in terminal patients.⁹¹ But the principle at stake does not make that assumption: it does not suppose that a patient is always in a better position to assess his own interests. It rather insists that when the interests in question are *ethical* interests, competent people must be left free to decide for themselves, even when their own decision is likely to be, either from some objective or from the majority perspective, the wrong one. Of course, government's responsibility to protect people from decisions they are *not* competent to make, because they lack medical knowledge or are cognitively impaired, is another matter and is not denied by the principle I am describing. Indeed, the strongest argument against recognizing a right to assisted suicide is the Solicitor General's claim in the present cases: that though the principle is right, that responsibility competes with and trumps it. I cannot pursue that issue here.⁹²

90. See West, *supra* note 81, at 1329.

91. *Id.* at 1326-27.

92. See Brief, *supra* note 66.